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No. 94-1605

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RICHARD M. MITCHELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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None of respondent's assertions detracts from petitioner's central argument that this Court should grant certiorari to resolve longstanding uncertainty as to the proper construction of the phrase "contrary to law" in 18 U.S.C. § 545 and a host of other federal statutes. The overarching question posed by this case is whether courts should presume that this language in a criminal statute excludes regulations as this Court seems to have held previously or presume that it includes regulations as the Fourth Circuit held here. Respondent's argument merely underscores the need for guidance from this Court to resolve the confusion arising from the Court's prior decisions as to what approach to follow in deciding whether a violation of mere regulations is a crime under the terms of many federal criminal statutes.

1. Respondent relies on *Estes* v. *United States*, 227 F. 818 (8th Cir. 1915), as evidence that there is no confusion in the lower federal courts concerning the proper construction of the "contrary to law" provision of

Section 545. Opp. 5-7. As the dissent below makes clear, however, *Estes* itself reflects profound confusion about this Court's decisions in *United States* v. *Eaton*, 144 U.S. 677 (1892), and *United States* v. *Grimaud*, 220 U.S. 506 (1911), both of which addressed the central issue in this case: under what circumstances a violation of regulations is a crime under the terms of a federal criminal statute. See Pet. App. 24a & n.5. In *Eaton*, this Court held that failure to comply with a regulation promulgated pursuant to a statute did not subject a defendant to penalties prescribed in that statute for "omit[ting], neglect[ing] or refus[ing], to do, or caus[ing] to be done, any of the things *required by law*," 144 U.S. at 685 (emphasis added), on the grounds that "[i]f Congress intended to make [violation of the regulation] an offence[,] . . . it would have done so distinctly." *Id.* at 688. In *Grimaud*, the Court employed similar reasoning but reached the opposite conclusion: it distinguished *Eaton* and sustained a conviction for violating regulations promulgated by the Secretary of Agriculture because the statute in question punished violations "of the provisions of this act *or such rules and regulations of the Secretary*." 220 U.S. at 519 (emphasis added).

Despite the lack of any such express reference to regulations in Section 545, the court in *Estes* relied on *Grimaud* to distinguish *Eaton*, thereby flouting the principle of statutory construction enunciated in *Eaton* (and upheld in *Grimaud*) that if Congress intended to make violation of a regulation an offense, "it would have done so distinctly." *Eaton*, 144 U.S. at 688. Not only does respondent's reliance on *Estes* completely overlook the confusion evident in that opinion, it also fails to address the uncertainty arising from other lower federal court cases that underline the ambiguity inherent in Section 545. See, *e.g.*, *United States* v. *Lee*, 937 F.2d 1388, 1397 (9th Cir. 1991) ("one must always look to another *statute* . . . to determine whether a violation of section 545 has taken place"), *cert. denied*, 502 U.S. 1076

(1992) (emphasis added); *Goldberg* v. *United States*, 277 F. 211, 217 (8th Cir. 1921) ("contrary to law" means contrary to "some other act of Congress"); see also Pet. 7-9. Respondent correctly notes that these cases are not dispositive, but, as the dissent below concluded, "the cases reveal grievous ambiguity or uncertainty" as to the proper construction of "contrary to law." Pet. App. 27a.

Moreover, respondent utterly fails to address "the confusion necessarily arising from the fact that many statutes say 'law and regulations' and yet § 545 says only 'contrary to law.'" *Id.* at 23a-24a (footnote omitted). "Contrary to law" is found in at least 30 federal statutes, while numerous other federal statutes define prohibited or reviewable conduct as "contrary to law or regulation." See Pet. 9. The existence of these provisions at the very least demonstrates the ambiguity inherent in the "contrary to law" provision of Section 545, and, moreover, supports this Court's conclusion that when Congress intends to make violation of regulations a criminal offense, it "do[es] so distinctly." *Eaton*, 144 U.S. at 688. Certiorari is warranted in this case to ensure a uniform approach to interpreting the language "contrary to law" in federal criminal statutes, particularly given that this issue of statutory construction implicates the imposition of criminal liability and the loss of individual liberty.

2. Respondent's reliance on *United States* v. *Howard*, 352 U.S. 212 (1957), is misplaced. See Opp. 8-9, 11. In *Howard*, this Court held that a Florida regulation was a "law" for purposes of a federal statute making it unlawful to transport fish if such transportation was "contrary to the law of the State" from which the fish was transported. 352 U.S. at 213, 219. The Court found that *Eaton* was inapposite and that "[i]t ha[d] not been construed to state a fixed principle that a regulation can never be a 'law' for purposes of criminal prosecutions." *Id.* at 215-16 (quoting *Singer* v. *United States*, 323 U.S.

338, 345 (1945)). *Howard*, however, does not control this case for a number of reasons.

First, the holding in *Howard* was based in part on a finding that Congress clearly intended to extend the prohibitions of the statute to regulatory violations. *Id.* at 218. The Court cited legislative history of the statute which explicitly stated that "the Federal Government must collaborate in the enforcement of protective laws *and regulations*." *Id.* at 219 (emphasis added). In contrast, respondent points to nothing in the legislative history of Section 545 that evinces congressional intent to bring regulatory violations within the ambit of that statute. In fact, the panel below observed that when the "contrary to law" provision now codified at Section 545 was reenacted as part of the Tariff Acts of 1922 and 1930, other provisions of the Acts referred explicitly to "law and regulations," thus supporting the inference that "contrary to law" does not embrace "regulations." See Pet. App. 6a-7a n.6.

Second, the *Howard* Court's observation that *Eaton* did not hold that a regulation can never be a "law" for purposes of criminal prosecutions derives from *Singer* v. *United States*, 323 U.S. 338 (1945), which stated, in pertinent part, that

> *United States* v. *Eaton* turned on its special facts, as *United States* v. *Grimaud*, 220 U.S. 506, 518-519, emphasizes. It has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute.

323 U.S. at 345. The Court then noted that Congress had not prescribed criminal penalties for violations of the regulations at issue in *Eaton*, but that the statute at issue in *Singer* made it a felony for a person to "fail or neglect to perform any duty required of him under or in the execution of this Act, or *rules or regulations made pur-*

suant to this Act." *Id.* (emphasis added). *Singer* is premised, therefore, on the same distinction that this Court drew in *Grimaud* and *Eaton* between statutes that expressly punish violations of regulations and those, like Section 545, that do not. For this reason, respondent's reliance on *Howard* does nothing to detract from the conclusion that the lack of any express reference to regulations in Section 545 creates "grievous ambiguity" and confusion as to the scope of that statute.[1]

3. Respondent's assertion that "[t]his case does not present any conflict between the rule of lenity and the presumption against implied repeals" wholly misses the point. Opp. 12. Respondent, like the panel below, attempts to divorce the construction of "contrary to law" from the question of repeal by implication, when, in fact, the issues are inexorably linked.

In *United States* v. *Batchelder*, 442 U.S. 114, 121-22 (1979), this Court addressed the issue of implied repeals and held that no conflict inheres in the fact that two statutes provide different penalties for the same conduct. In that case, however, the Court found that there was "no ambiguity to resolve" because the defendant's conduct "unquestionably violated" the statute under which he was convicted. *Id.* at 121. In this case, however, application of *Batchelder* simply begs the question. There

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[1] Respondent's reliance on *Chrysler Corporation* v. *Brown*, 441 U.S. 281 (1979), is wholly unpersuasive. *See* Opp. 9-11. As the dissent below observed, *Brown* was a civil case and therefore did not implicate the application of the rule of lenity, which is central to resolution of this case. *See* Pet. App. 23a n.2. Moreover, the Court in *Brown* found nothing in the legislative history of the statute in question to indicate that the phrase "authorized by law" did not extend to administrative regulations. 441 U.S. at 298. The legislative history of the "contrary to law" provision of Section 545, however, suggests otherwise. As discussed *supra* at 4, the use of "law and regulations" elsewhere in the Tariff Acts of 1922 and 1930 is powerful evidence derived from the structure of the Act that Congress did not intend for the "contrary to law" provision in those statutes to encompass regulations.

is in fact "ambiguity to resolve" regarding the proper construction of "contrary to law," and Congress's specific provision of misdemeanor penalties for violations of two of the regulations at issue here only deepens that ambiguity. Under these circumstances, *Batchelder*'s presumption against implied repeals runs headlong into the rule of lenity.

This Court's decision in *Simpson* v. *United States*, 435 U.S. 6 (1978), suggests that it is improper to rely on *Batchelder* to resolve an apparent conflict between two criminal statutes when, as here, it is unclear whether one of the statutes even reaches the conduct at issue. See Pet. 12. This Court should grant certiorari to resolve the tension between the application of the rule of lenity and the *Batchelder* presumption against implied repeals in the context of ambiguous criminal statutes.

4. In sum, petitioner is not claiming, as the United States seems to suggest, that the term "contrary to law" has one inexorable statutory definition that excludes "regulations." Rather, petitioner's contention is that, because Congress knows how to "distinctly" include "regulations" when it so chooses, Congress's use of the statutory term "contrary to law" in a criminal statute should give rise to a presumption that regulations are not included. That presumption could be sustained, as it was in *Eaton*, or overcome by a contrary finding of congressional intent, as in *Howard*. But, in this case, the court below applied the opposite presumption and concluded—in the face of contrary evidence of congressional intent—that the term "contrary to law" included regulations. That holding simply cannot be reconciled with existing precedent, no matter how this Court's prior decisions are parsed. Accordingly, certiorari should be granted to resolve whether the widely-used statutory term "contrary to law" in a criminal statute is presumed to include, or exclude, a violation of administrative regulations.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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